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In The

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-2028

In the Matter of the Application of ALDENS, INC.,
Petitioner-Appellant,

against

JAMES H. TULLY, JR., MILTON KOERNER, and THOMAS H. LYNCH, constituting the Tax Commission of the State of New York,

Appellees.

MOTION TO DISMISS OR AFFIRM ON BEHALF OF APPELLEES JAMES H. TULLY, JR., MILTON KOERNER AND THOMAS H. LYNCH, CONSTITUTING THE TAX COMMISSION OF THE STATE OF NEW YORK

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The appellees move the Court to dismiss the appeal herein on the ground that it does not present a substantial Federal question or, in the alternative, to affirm the judgment of the Court of Appeals of New York, on the ground that it is manifest that the Federal questions raised are so unsubstantial as not to need further argument.

Question Presented

When a mail order business corporation, organized under the laws of a sister state, but licensed to do business within the State of New York, through a wholly-owned subsidiary maintains offices and employees doing business at four different locations

in the State of New York, is it an undue burden on it, in violation of the Commerce Clause of the Constitution of the United States, or a deprivation of its right to due process, for the State to require the corporation to collect and transmit to the State local, as distinguished from State, use taxes on goods sold and delivered by it to purchasers at localities within the State where it does not maintain an office nor employees?

The Nature of the Case

In 1965 the State of New York enacted a Statewide sales and use tax on personal property to be administered and enforced by the State Tax Commission (New York Tax Law, Article 28). The law imposed on vendors the obligation to collect the tax (Tax Law, §1131[1], §1101[b][8][B] and [C]). The State also delegated to localities the authority to impose local sales and use taxes (Tax Law, Article 29). However, the State reserved unto itself the right to have such local taxes to be "administered and collected by the state tax commission" (Tax Law, §1250). The State statute thus provided that every person required to collect the State tax shall at the same time collect any applicable local tax (Tax Law, §1254). This was done for obvious reasons. The burden placed on the vendor was limited to the filing of a single tax return with the State Tax Commission rather than multiple returns; the administrative cost of collection and enforcement was reduced and there was a single unified interpretation of the statute by one agency, the State Tax Commission. "Persons required to collect tax" was defined as "every vendor of tangible personal property or service" (Tax Law, §1131[1]). "Vendor" was defined as

> "(B) A person maintaining a place of business in the state and making sales, whether at such place of business or elsewhere, to persons within the state of tangible personal property or services, the use of which is taxed by this article;

> "(C) A person who solicits business either by employees, independent contractors, agents or other representatives or by distribution of catalogs or other advertising matter and by reason thereof makes sales to persons within the state of tangible personal property or services, the use of which is taxed by this article;"

The appellant, Aldens, Inc., is a corporation organized and existing under the laws of the State of Illinois with its main office and several warehouses in Illinois from which it conducts a mail order business. Aldens, Inc., qualified to do business in New York, filed franchise tax returns for the years 1965 through 1969 with the New York State Tax Commission in accordance with Tax Law, §209, paying a tax to New York State on all its revenues derived from the New York market. Aldens Catalog Offices, Inc. is a wholly-owned subsidiary of Aldens, Inc. and is organized under the laws of the State of Indiana as a sales agent for Aldens, Inc. It has its principal office in Chicago, Illinois and maintained and operated four offices in the State of New York. The office in Buffalo (Erie County) had six employees, the office in Rochester (Monroe County) had seven employees, the office in the City of Syracuse had six employees and the office in New York City had ten employees. The offices were listed in the local telephone directories including the "yellow pages" thereof. The offices solicited and took orders over the telephone or in person from customers both inside and outside the local area of the office. They also received credit applications at the offices. All orders and credit applications were forwarded to the main office in Chicago. The merchandise was forwarded by appellant from its Chicago office to the purchaser by parcel post or common carrier.

During the tax period (August 1, 1965 through November 30, 1969), the appellant Aldens, Inc. filed sales and use tax returns with the State of New York. The returns disclosed that the appellant had collected and remitted to the State the full amount of State sales or use taxes (at that time 2%) on all shipments of

merchandise by appellant to purchasers in the State of New York. The returns further disclosed that the appellant had collected and remitted to the State the local sales or use taxes on all shipments of merchandise by it within the four localities where the appellant's offices were maintained, to wit: The Counties of Erie and Monroe and the Cities of Syracuse and New York*. The appellant did not collect and remit to the State, local use taxes for shipments of its merchandise to purchasers in any other localities in the State of New York. At that time, other localities in the State had in effect local sales or use taxes**.

In or about November 1967 the appellant executed a consent extending the period of limitation for assessment of the sales and use taxes under Articles 28 and 29 of the Tax Law to any time on or before March 20, 1970.

On March 5, 1970, the State Tax Department issued a Notice of Determination and Demand for Payment of sales and use taxes against the appellant for the periods between August 1, 1965 through November 30, 1969 in the amount of $77,933.44 plus penalty and interest in the amount of $15,968.62, for a total of $93,902.06. The appellant timely filed an application to review the determination.

The appellant and the Tax Department entered into a Stipulation of Facts on September 23, 1976 in lieu of a formal hearing.

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*The Counties of Erie and Monroe and the Cities of Syracuse and New York had during this period enacted local sales and use taxes. These localities contain 61% of the entire population of New York State (NY Legis Ann, 1977-79, pp 1321-1354).

**During the period August 1, 1965 through February 29, 1968, in addition to the Counties of Erie and Monroe and the Cities of Syracuse and New York approximately 10 to 13 other New York localities had enacted sales and use taxes.

On August 16, 1977, the State Tax Commission issued its determination affirming the Determination and Demand of March 5, 1970 for payment.

The appellant then brought a proceeding in Supreme Court, Albany County, for judicial review of the determination of the appellee. A judgment dismissing the appellant's petition on the merits was entered in the Office of the Clerk of Albany County on July 20, 1978. The appellant appealed said judgment to the Appellate Division, Third Department of the Supreme Court of New York. On May 24, 1979 an order was entered in the Office of the Clerk of that Court affirming the judgment appealed from. The appellant appealed to the Court of Appeals of the State of New York from said order. On March 25, 1980 a final judgment was entered in the Office of the Clerk of the Court of Appeals affirming the order of the Appellate Division, Third Department.

The appeal to this Court was filed in the Court of Appeals and the Supreme Court, Albany County on June 19, 1980. A copy of the Notice of Appeal was received by this office on June 19, 1980.

Statutes Involved

New York Tax Law

Article 28:

"§ 1101. Definitions

* * *

"(8) Vendor. (i) The term 'vendor' includes:

* * *

"(B) A person maintaining a place of business in the state and making sales, whether at such place of business or elsewhere, to persons within the state of tangible personal property or services, the use of which is taxed by this article;

"(C) A person who solicits business either by employees, independent contractors, agents or other representatives or by distribution of catalogs or other advertising matter and by reason thereof makes sales to persons within the state of tangible personal property or services, the use of which is taxed by this article; and

* * * "

"§ 1105. Imposition of sales tax

"On and after June first, nineteen hundred seventy-one, there is hereby imposed and there shall be paid a tax of four percent upon:

"(a) The receipts from every retail sale of tangible personal property, except as otherwise provided in this article."

"§ 1131. Definitions

"When used in this part IV,

"(1) 'Persons required to collect tax' or 'person required to collect any tax imposed by this article' shall include: every vendor of tangible personal property or services;"

Article 29:

"§ 1210. Taxes of cities and counties administered by state tax commission

"Notwithstanding any other provision of law to the contrary, but subject to the limitations and exemptions in part II of this article, any city in this state or county in this state, except a county wholly within a city, acting through its local legislative body, is hereby authorized and empowered to adopt and amend local laws, ordinances or resolutions imposing in any such city or county the following taxes, * * *

"(a) (1) Either, all of the taxes described in article twenty-eight of this chapter, at the same uniform rate, as to which taxes all provisions of the local laws, ordinances or resolutions imposing such taxes shall be identical, except as to rate and except as otherwise provided herein,

with the corresponding provisions in such article twenty-eight, including the definition and exemption provisions of such article, so far as the provisions of such article twenty-eight can be made applicable to the taxes imposed by such city or county and with such limitations and special provisions as are set forth in this article; * * *."

"§ 1213. Deliveries outside the jurisdiction where sale is made

"Where a sale of tangible personal property or services * * * is made in any city, county or school district, but the property sold or the property upon which the services were performed is or will be delivered to the purchaser elsewhere, such sale shall not be subject to tax by such city, county or school district. However, if delivery occurs or will occur in a city, county or school district imposing a tax on the sale or use of such property, the vendor shall be required to collect from the purchaser, as provided in section twelve hundred fifty-four, the aggregate sales or compensating use taxes imposed by the city, if any, county and school district in which delivery occurs or will occur, for distribution by the state tax commission to such taxing jurisdiction or jurisdictions. For the purposes of this section delivery shall be deemed to include transfer of possession to the purchaser and the receiving of the property by the purchaser."

"§ 1250. Administration and collection

The taxes imposed under the authority of sections twelve hundred ten, twelve hundred eleven, twelve hundred twelve and twelve hundred twelve-A shall be administered and collected by the state tax commission in the same manner as the taxes imposed under article twenty-eight of this chapter are administered and collected by such commission. All of the provisions of such article relating to or applicable to the administration and collection of the taxes imposed by that article shall apply to the taxes imposed under the authority of section twelve hundred ten, twelve hundred eleven, twelve hundred twelve or twelve hundred twelve-A, including sections eleven hundred one and eleven hundred eleven

and sections eleven hundred thirty-one through eleven hundred forty-seven, with the same force and effect as if those provisions had been incorporated in full into this article and had expressly referred to the taxes imposed under sections twelve hundred ten through twelve hundred twelve-A, except to the extent that any provisions of such article twenty-eight are either inconsistent with a provision of this article or are not relevant to this article. For purposes of this article, the term 'tax' in Part IV of such article twenty-eight shall include any tax imposed under the authority of section twelve hundred ten, twelve hundred eleven, twelve hundred twelve or twelve hundred twelve-A. Wherever there is joint collection of state and local taxes, it shall be deemed that such collections shall represent proportionally the applicable state and local taxes in determining the amount to be remitted to local taxing jurisdictions."

"§ 1254. Duty to collect taxes

"(a) Every person required to collect tax, as defined in section eleven hundred thirty-one, who is required to collect any state tax imposed under sections eleven hundred five, eleven hundred six or eleven hundred ten, shall at the same time collect any applicable tax imposed by a city, county or school district under the authority of sections twelve hundred ten, twelve hundred eleven, twelve hundred twelve or twelve hundred twelve-A, and where the state tax is a retail sales tax, shall also collect any compensating use tax which may be applicable as provided in sections twelve hundred thirteen or twelve hundred fourteen."

ARGUMENT

The case does not present a substantial Federal question or presents a Federal question so unsubstantial as not to need further argument.

It is well settled that a State can validly make a vendor its tax collector. *Monamotor Oil Co. v Johnson, Treasurer of Iowa*, 292 US 86 (1934); *Felt & Tarrant Manufacturing Co. v Gallagher*, 306 US 62 (1939).

It is well settled that an out-of-State vendor can validly be made a tax collector if the vendor has a nexus between it and the State. *Monamotor Oil Co. v Johnson, Treasurer of Iowa, supra; Nelson v Sears, Roebuck & Co.*, 312 US 359 (1941); *Nelson v Montgomery Ward*, 312 US 373 (1941); *General Trading Co. v Tax Commission*, 322 US 335 (1944); *Scripto, Inc. v Carson*, 362 US 207 and *National Geographic Society v California Board of Equalization*, 430 US 551 (1977).

Appellant's argument that a "nexus" between it and each local taxing authority is a prerequisite to the imposition of the duty to collect the local tax was rejected by the New York State Court of Appeals as follows (A-8):

> "In pleading for a nexus between the out-of-State seller and each local tax area as a necessary predicate for the imposition of tax collection liability petitioner overlooks what is a significant, indeed decisive, fact in the situation presented by this case — namely, that the obligation for petitioner's collection of local use taxes has been imposed by State, not local, action, i.e., the enactment by our State Legislature of subdivision (a) of section 1254 of the Tax Law. Indeed, the levies of the local use taxes were themselves only a product of enabling State action, without which they would have been ineffective and invalid. In the adoption and imposition of local use taxes, cities and counties exercise a power vested in the State, only to the extent and within the limits the State has seen fit to delegate such authority to them. With respect to

> collection of the use taxes which local governmental bodies may elect to assess, the State Legislature has seen fit not to delegate, but has itself directed that the obligation for collection shall rest on those who qualify as vendors under section 1101 (subd [b], par [8]) of the Tax Law — for present purposes, sellers who maintain a place of business in the State and make sales to persons within the State. The legislation by which this was accomplished is no less the State's imposition of a duty than is its imposition on such vendors of a duty to collect the State use tax levied by section 1110 of the Tax Law."

That a "nexus" exists between the appellant and the State of New York is amply demonstrated by the fact that the appellant's subsidiary maintained within the State, four offices with 29 employees for the purpose of taking orders over the telephone and soliciting customers for orders by telephone. The New York State Court of Appeals thus concluded (A-9):

> "For the privilege of doing business in the State thus enjoyed by petitioner, the State may ask a return in the form of tax collection. Indeed, petitioner has not contended otherwise but frankly admits that it has at all times during the period in question complied with the obligation imposed on it to collect State use taxes. The State is no less entitled to require its collection of use taxes enacted by cities and counties pursuant to the State's delegated authority."

The Court also concluded (A-5):

> "Nor is any reason advanced for imposing a heavier collection burden on a domestic corporation which is located only in a single county of the State (but which concededly must collect use taxes on all deliveries anywhere within the State) than on a foreign corporation which is located within but a single county (here four counties) within the State."

The State of New York has a vital and direct interest in the collection of local sales and use taxes. If the State did not mandate that the vendor collect the local tax at the same time he

collects the State tax, the entire local sales and use tax programs as revenue producers would be seriously impaired. A local jurisdiction may enact, by local law, a sales and use tax; however, it cannot by such local law effectively compel a vendor beyond its jurisdiction to collect a use tax on merchandise shipped to within its jurisdiction. The New York State Legislature, aware of this fact and in order to assure that local sales and use tax programs produced maximum revenue, has by State legislation mandated the collection of the local sales and use taxes by every vendor as defined in the statute.

Effective collection of tax revenue by the localities is of the utmost importance to the State. The financial affairs of the localities have impact on the State as a whole (see *Subway-Surface Supervisors v New York City Transit*, 44 NY2d 101 [1978]; *Flushing National Bank v MAC*, 40 NY2d 731 [1976]; *Wein v State of New York*, 39 NY2d 136 [1976]; *Wein v City of New York*, 36 NY2d 610 [1975]; New York City Financial Emergency Act, Laws 1975, ch 868, as amended by ch 870; chapter 396 of Laws of 1975 as amended by ch 490 of Laws of 1976; chapter 488 of Laws of 1976 as amended by ch 489 of the Laws of 1976.)

This is not a case of "manifest unfairness of the application of the local use tax collection scheme to appellant," as the appellant argues (15). Rather, appellant seeks to obtain an unfair economic advantage over resident New York vendors. All vendors in New York are required to collect the local tax at the same time they collect the State tax. A vendor in Buffalo who ships merchandise to Albany County, which has enacted a sales and use tax, must collect the Albany tax despite the fact that such vendor has no presence in Albany County. The appellant who maintains sales offices in four localities in the State should bear the same burden which is neither an undue burden nor an interference with free trade among the states. Had the appellant, like the mail order house in *Bellas Hess*, limited its contact to New York State by

mail or common carrier, it could not be constitutionally compelled to collect any State or local taxes. The appellant, because it maintained its four sales offices in New York, falls clearly within this Court's decision in *National Geographic Society v California Board of Equalization*, 430 US 551 (1977).

The appellant's assertion, (p. 14) that the decision below would thrust upon "thousands" of mail order houses the tax collection obligation of countless local governmental units, finds no basis in the record and is patently absurd.

CONCLUSION

The appeal should be dismissed or affirmed.

Dated: Albany, New York
July 3, 1980

Respectfully submitted,

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APPENDIX

MTR OF ALDENS, INC. v TULLY [49 NY 2d 525]

Statement of Case

In the Matter of Aldens, Inc., Appellant, v James H. Tully, Jr., et al., Respondents.

Argued February 4, 1980; decided March 25, 1980

OPINION OF THE COURT

Jones, J.

[1] When a foreign mail-order business corporation is licensed to do business within the State and, through a wholly owned subsidiary, maintains offices and employees doing business at four different localities in the State, it is neither an undue burden on it in violation of the commerce clause of the Constitution of the United States nor a deprivation of its right to due process for the State to require the corporation to collect local, as distinguished from State, use taxes on goods sold and delivered by it to purchasers at every locality within the State, despite the fact its only contact with such locality is by mail and common carrier.

Petitioner, an Illinois corporation engaged principally in a mail-order merchandise sales business, brought this article 78 proceeding to review a determination by the State Tax Commission imposing liability on it for the collection and remittal of local sales and use taxes on all sales of goods to customers within New York State between August 1, 1965 and November 30, 1969. Its petition alleged that during the period in question it had been engaged in a mail-order business in all 50 States of the United States as well as in foreign countries or territories with its main offices and warehouses in the State of Illinois. Petitioner had made a wide distribution of catalogs by mail throughout these areas; using blanks included in the catalogs customers mailed their orders to the Illinois offices where the orders were accepted and filled, either by direct mail or by common carriers.

Petitioner did not sell or offer for sale in New York any merchandise through its employees or salesmen. A wholly owned subsidiary of petitioner organized under the laws of Indiana and maintaining its principal offices in Illinois, Alden Catalog Offices, Inc., had four telephone offices in New York, one each in New York City and the Counties of Monroe, Erie and Onondaga, with a total of 29 employees. The function of these offices was to receive telephone orders for catalog items from customers. Subsidiary duties of employees at the four offices included telephone solicitation of orders made from the several offices and receipt of orders from persons who might come to the offices personally. All such orders were forwarded to petitioner's Illinois headquarters for acceptance. Employees at these offices engaged in no sales activities outside the offices. The telephone number and location of each of the offices were listed in the telephone directory serving the area in which it was located, including the "Yellow Pages" of such directory, but no listing was included in any directory serving metropolitan areas other than those in which the offices were located. The subsidiary had no other business locations or employees of any kind in the State.

For the period in question petitioner duly collected and paid to the Sales Tax Bureau of the State Department of Taxation and Finance the State sales and compensating use taxes on all sales to customers located anywhere within the State as well as local sales and use taxes imposed on sales to customers located in Erie, Monroe and Onondaga Counties and in New York City, the areas where the subsidiary, Alden Catalog Offices, Inc., maintained offices. On March 5, 1970 the Sales Tax Bureau notified petitioner that there were use taxes[1] due for the period in

[1]Although the administrative determinations spoke collectively of the obligation to collect sales and use taxes, only the collection of use taxes is actually involved in this case. There is no contention that any sales—as distinguished from delivery of goods in fulfillment of sales completed at petitioner's Illinois offices—were made in New York.

question which, with penalties and interest, totaled $93,902.06. This assessment was predicated on petitioner's failure to collect and remit to the bureau local use taxes on goods sold to customers in areas within the State in which such local taxes were imposed other than the four areas in which offices of Alden Catalog Offices, Inc., were located. Following petitioner's request for a review and reversal of the Sales Tax Bureau's determination by the State Tax Commission the parties entered into a stipulation of the facts recited above, after which, on August 16, 1977, the commission issued its determination that the deficiencies had been properly determined by the bureau.

In the present article 78 proceeding, in which petitioner has thus far been unsuccessful, it urges three arguments — one statutory and two constitutional — in support of its demand for annulment of determinations which have held it liable for collection and remittal to the Sales Tax Bureau of local use taxes on items sold by mail order to customers in areas in which neither it nor its subsidiary maintained any business office or employees. First, it asserts that although it was required by the provisions of article 28 and 29 of the Tax Law to collect State use taxes on goods sold to customers anywhere in the State and to collect local use taxes on goods sold to customers in the four tax units in which its subsidiary had its offices, nothing in the statute imposed on it a corollary duty to collect local taxes with respect to sales made within the State but outside those four areas. Next, it contends that if the Tax Law be found to have imposed such a duty, it both places an undue burden on interstate commerce[2] and also violates the due process clause of the United States Constitution.[3] Finally, petitioner argues that if the Tax Law is construed constitutionally to impose on it the

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[2](US Const, art I, § 8.)

[3](US Const, 14th Amdt, § 1.)

obligation to collect local use taxes, the due process clause prohibits the imposition of retroactive liability for prior uncollected taxes.

We turn first to the question whether there is statutory authority for requiring petitioner to collect the challenged local use taxes. Article 28 of the Tax Law adopted in 1965 provided for the imposition of State sales and use taxes (§§1105, 1106, 1110) setting out exemptions and the details of administration of the taxes so imposed (L 1965, ch 93). Article 29, simultaneously enacted, defined the authority of cities, counties and school districts to impose or to have imposed for their benefit a variety of local taxes. Included in this article was a provision empowering cities and most counties within the State by local law, ordinance or resolution to impose sales and use taxes "identical, except as to rate and except as otherwise provided herein, with the corresponding provisions in such article twenty-eight, including the definition and exemption provisions of such article, so far as the provisions of such article twenty-eight can be made applicable to the taxes imposed by such city or county and with such limitations and special provisions as are set forth in this article" (§1210, subd [a], par [1]). The section expressly provided that such local taxes were to be "administered, collected and distributed by the state tax commission", in which had been vested the authority for implementation and enforcement of the State sales and use taxes.

With respect to initial collection of the local taxes authorized by article 29, subdivision (a) of section 1254 provided: "Every person required to collect tax, as defined in section eleven hundred thirty-one, who is required to collect any state tax imposed under sections eleven hundred five, eleven hundred six or eleven hundred ten, shall at the same time collect any applicable tax imposed by a city, county or school district under the authority of sections twelve hundred ten". Looking then, as one

must, to subdivision (1) of section 1131 (within art 28) for the definition of "Persons required to collect tax", one finds such persons to be "every vendor of tangible personal property or services". Insofar as relevant to our present considerations, "vendor" was in turn defined by section 1101 (subd [b], par [8], cls [B], [C]) of article 28 as

"(B) A person maintaining a place of business in the state and making sales, whether at such place of business or elsewhere, to persons within the state of tangible personal property or services, the use of which is taxed by this article;

"(C) A person who solicits business either by employees, independent contractors, agents or other representatives or by distribution of catalogs or other advertising matter and by reason thereof makes sales to persons within the state of tangible personal property or services, the use of which is taxed by this article".

It remains only to retrace the steps through the statutory sections just recited to conclude that petitioner was a "vendor" under section 1101 (subd [b], par [8]) by reason of its maintenance of four places of business in the State and its solicitation of business through its employees there (its subsidiary's four offices and their employees' activities), that as a "vendor" it was a "person required to collect tax" under subdivision (1) of section 1131 and that, in view of its uncontroverted duty to collect State taxes on sales made to all its customers located within the State, it was required by subdivision (a) of section 1254 also to collect local use taxes on the items which were the subject of those sales.

In refutation of this logical progression petitioner urges that, when liability for collection of local use taxes is at issue, the language of section 1101 (subd [b], par [8]) must be judicially edited so that in place of reference in clause (B) to maintaining a place of business "in the state" the provision must be read as

maintaining a place of business "within the local taxing unit", and that to the reference in clause (C) to soliciting business there must be added a limitation to "within the specific locality of the local taxes". However, no justification for such rewriting of the statutory provisions is to be found in the language or design of article 29, the article treating local taxes. Moreover, the alterations for which petitioner contends would substantially undermine the manifest purpose of the Legislature to have a single governmental agency — the State Tax Commission — serve as administrator of sales and use tax collections, be they State or local taxes. In the case of property purchased by mail by a customer in a city or county with which the seller's only contact was by mail and common carrier, each local taxing body would have to maintain its own use tax collection and enforcement bureau with the expenses incidental thereto, and the likelihood of success in such collection — necessarily from the buyer on the basis of individual sales — would be substantially diminished, for, as has been noted with respect to a use tax, "the impracticality of its collection from the multitude of individual purchasers is obvious" *(National Geographic v California Equalization Bd.*, 430 US 551, 555). "Nor is any reason advanced for imposing a heavier collection burden on a domestic corporation which is located only in a single county of the State (but which concededly must collect use taxes on all deliveries anywhere within the State) than on a foreign corporation which is located within but a single county (here four counties) within the State."

We reject petitioner's attempt to find statutory authority for the position it espouses in the use of the apparently tautological language in subdivision (a) of section 1254 — "Every person required to collect tax, as defined in section eleven hundred thirty-one, who is required to collect any state tax imposed under sections eleven hundred five, eleven hundred six or eleven

hundred ten". With nothing more than what we regard as a duplication of expression to support its argument, and with language readily available to the Legislature, were it so disposed, clearly to have limited the obligation of collection as petitioner would have it, we cannot accept the hypothesis that subdivision (a) of section 1254 sets up two qualifications which must be met before the obligation to collect local taxes befalls — i.e., that the person under consideration be independently required to collect the local tax (a requirement that petitioner contends could be met only by fulfillment of the definition of "vendor" with the concept of locality substituted for the language "in the state") as well as being required to collect any State sales or use tax.

We also reject petitioner's reliance on the inclusion in section 1210 of the Tax Law, following the authorization for local enactment of all taxes described in article 28 in form identical to the article 28 taxes, of the words "so far as the provisions of such article twenty-eight can be made applicable to the taxes imposed by such city or county" as indicative that the adaptations of the statutory term "vendor" for which it argues are mandated by the statute. The language quoted clearly was pertinent to the substance of the taxes themselves and their imposition and was made necessary by the fact that the taxes thereby authorized for local enactment were described only by general reference to the preceding article of the statute. In view of the inclusion of section 1254, dealing expressly with collection of local taxes adopted pursuant to article 29, and its specificity, there is no occasion to modify that section by reason of the provision contained in section 1210 relevant to the substance of the taxes.

We therefore conclude that there was no error in the determination by the State Tax Commission and the courts below that petitioner was required by subdivision (a) of section 1254 of the

Tax Law to collect and remit local use taxes on goods sold to customers within the State but outside the taxing units in which petitioner maintained a place of business.

Next to be addressed is the contention that the statute as so construed unreasonably burdens interstate commerce and deprives petitioner of its right to due process in contravention of the United States Constitution. It should be noted at the outset that petitioner raises no challenge to the power of local authorities that have enacted sales taxes to impose compensating use taxes on goods bought outside the taxing area, recognizing the decision in *National Geographic v California Equalization Bd.* (430 US 551, *supra*) and cases cited therein as authority for the existence of such power. It relies however on *National Bellas Hess v Department of Revenue* (386 US 753) and an extrapolation it would draw therefrom in support of its request for reversal of the order below. The case last cited, addressing claims of violation of due process and creation of an unconstitutional burden on interstate commerce advanced by an out-of-State mail-order seller resisting a statutory obligation to collect State use taxes on the items of its sales, summarized the law as follows: "These two claims are closely related. For the test whether a particular state exaction is such as to invade the exclusive authority of Congress to regulate trade between the States, and the test for a State's compliance with the requirements of due process in this area are similar. See *Central R. Co. v. Pennsylvania*, 370 U.S. 607, 621-622 (concurring opinion of MR. JUSTICE BLACK). As to the former, the Court has held that 'State taxation falling on interstate commerce . . . can only be justified as designed to make such commerce bear a fair share of the cost of the local government whose protection it enjoys.' *Freeman v. Hewit*, 329 U.S. 249, 253. See also *Greyhound Lines v. Mealey*, 334 U.S. 653, 663; *Northwestern Cement Co. v. Minnesota*, 358 U.S. 450, 462. And in determining whether a

state tax falls within the confines of the Due Process Clause, the Court has said that the 'simple but controlling question is whether the state has given anything for which it can ask return.' *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444. See also *Standard Oil Co. v. Peck*, 342 U.S. 382; *Ott v. Mississippi Barge Line*, 336 U.S. 169, 174. The same principles have been held applicable in determining the power of a State to impose the burdens of collecting use taxes upon interstate sales. Here, too, the Constitution requires 'some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.' *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 344-345; *Scripto, Inc. v. Carson*, 362 U.S. 207, 210-211. See also *American Oil Co. v. Neill*, 380 U.S. 451, 458." (386 US 756-757.) The court then concluded that, because the out-of-State seller's only connection with buyers in the State was by mail or by common carrier, the required nexus to permit the State's imposition of the burden of collection of its use tax was not present.

Petitioner argues by wishful extrapolation that the imposition of the duty of collection of all local use taxes within the State on a seller which is located only in particular counties within the State and whose only connection with buyers in other local tax areas is by mail or by common carrier is similarly infirm. However, simply because there are constitutional limitations on the burdens which may be placed on interstate commerce it does not follow, nor is there any precedent for holding, that that burden is to be measured by further compartmentalization of each State into its municipal subdivisions. No historical predicate is advanced to indicate that in assuring protection of commerce among the several States, any such intrastate partitioning was contemplated, and petitioner cites no Supreme Court case so holding. The cases in that court dealing with the obligation of collection of use taxes have all dealt with State, rather than local, taxes (e.g., *Scripto v Carson*, 362 US 207;

General Trading Co. v Tax Comm., 322 US 335; *Nelson v Sears, Roebuck & Co.*, 312 US 359).

In pleading for a nexus between the out-of-State seller and each local tax area as a necessary predicate for the imposition of tax collection liability petitioner overlooks what is a significant, indeed decisive, fact in the situation presented by this case — namely, that the obligation for petitioner's collection of local use taxes has been imposed by State, not local, action, i.e., the enactment by our State Legislature of subdivision (a) of section 1254 of the Tax Law. Indeed, the levies of the local use taxes were themselves only a product of enabling State action, without which they would have been ineffective and invalid. In the adoption and imposition of local use taxes, cities and counties exercise a power vested in the State, only to the extent and within the limits the State has seen fit to delegate such authority to them. With respect to collection of the use taxes which local governmental bodies may elect to assess, the State Legislature has seen fit not to delegate, but has itself directed that the obligation for collection shall rest on those who qualify as vendors under section 1101 (subd [b], par [8]) of the Tax Law — for present purposes, sellers who maintain a place of business in the State and make sales to persons within the State. The legislation by which this was accomplished is no less the State's imposition of a duty than is its imposition on such vendors of a duty to collect the State use tax levied by section 1110 of the Tax Law.

That being so, the only question appropriately to be raised is whether petitioner's activities within the State "adequately establish a relationship or 'nexus' between the [petitioner] and the State" such that the obligations imposed are not unconstitutional *(National Geographic v California Equalization Bd.*, 430 US 551, 556, *supra)*. There can be no real doubt as to this issue. The *National Geographic* case found a sufficient nexus on

a showing no stronger than that demonstrated by the present record. There the out-of-State seller's maintenance of two offices within the State for solicitation of advertising for its magazine was adequate for its subjection to use tax collection duty with respect to items of mail-order sales made to customers within the State of California; here petitioner's subsidiary's maintenance of four offices with 29 employees for receipt, and some solicitation, of telephone orders can be no less adequate. For the privilege of doing business in the State thus enjoyed by petitioner, the State may ask a return in the form of tax collection. Indeed, petitioner has not contended otherwise but frankly admits that it has at all times during the period in question complied with the obligation imposed on it to collect State use taxes. The State is no less entitled to require its collection of use taxes enacted by cities and counties pursuant to the State's delegated authority.

[1, 2] Finally, we find without merit petitioner's claim that if the relevant Tax Law provisions are now construed constitutionally to impose upon it the obligation to collect local use taxes, the due process clause of the Federal Constitution prohibits the imposition of retroactive liability for prior uncollected taxes. In support of this claim it is apparently suggested that the State Tax Commission was obligated at some time prior to the Sales Tax Bureau's determination on March 5, 1970 to advise petitioner of its collection obligation. No statutory or decisional support for such a proposition is tendered, and lacking any such tender we decline to recognize such an affirmative obligation on this governmental agency. We are confronted with no more than the delayed enforcement of a collection obligation which petitioner chose to ignore. Insofar as petitioner seeks to find support in the alleged fact — not a part of the stipulation between the parties — that the Tax Commission promulgated a Model County or City Sales and Use Tax Resolution which employed the word "County" as the place of

doing business of one described as a "vendor", it need only be observed that the commission is without authority, by promulgation of such material or in any other way, to amend or to contravene the unambiguous language of the statute; nor, of course, may it be foreclosed on any theory of estoppel.

The order of the Appellate Division should be affirmed, with costs.

Chief Judge Cooke and Judges Jasen, Gabrielli, Wachtler, Fuchsberg and Meyer concur.

Order affirmed.